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No. 94-12

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

SEMINOLE TRIBE OF FLORIDA,

Petitioner,

vs.

STATE OF FLORIDA AND LAWTON CHILES, GOVERNOR OF FLORIDA,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR PETITIONER

JERRY C. STRAUS
MICHAEL L. ROY
JUDITH A. SHAPIRO
HOBBS STRAUS DEAN & WALKER
1819 H Street N.W.
Suite 800
Washington D.C. 20006
(202) 783-5100

BRUCE S. ROGOW
Counsel of Record
BEVERLY A. POHL
BRUCE S. ROGOW, P.A.
Suite 200
350 Southeast Second Street
Fort Lauderdale, FL 33301
(305) 767-8909

Attorneys for Petitioner

Of Counsel:

EUGENE GRESSMAN
JOHN J. GIBBONS

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QUESTIONS PRESENTED

I. Does the Eleventh Amendment prevent Congress from authorizing suits by Indian tribes against states for prospective injunctive relief to enforce legislation enacted pursuant to the Indian Commerce Clause, Article I, Section 8, Clause 3 of the Constitution?

II. Does the *Ex parte Young* doctrine permit suits against a state governor for prospective injunctive relief to enforce legislation enacted pursuant to the Indian Commerce Clause, Article I, Section 8, Clause 3 of the Constitution?

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SEMINOLE TRIBE OF FLORIDA,

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STATE OF FLORIDA AND LAWTON CHILES, GOVERNOR OF FLORIDA,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is reported at 11 F.3d 1016. Pet. App. 1a-25a. The order of the United States District Court for the Southern District of Florida is reported at 801 F. Supp. 655. Pet. App. 26a-42a. The district court's subsequent order on cross-motions

for summary judgment (unpublished) is on appeal to the Court of Appeals for the Eleventh Circuit, No. 93-5256, but that appeal has been stayed pending disposition of the proceedings in this Court. Pet. App. 43a-84a.

STATEMENT OF JURISDICTION

The judgment and opinion of the United States Court of Appeals for the Eleventh Circuit was entered on January 18, 1994. Pet. App. 1a. Respondents' motion for rehearing was denied April 6, 1994. Pet. App. 86a. The petition for a writ of certiorari was timely filed on July 1, 1994, and certiorari was granted on January 23, 1995. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Constitutional Provisions

U.S. Const. art. I, § 8, cl. 3 (The Commerce Clause):

> The Congress shall have Power. . .To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

U. S. Const. amend. XI:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

Statutes

Section 2710 of the Indian Gaming Regulatory Act is reprinted in its entirety in the appendix to the petition for writ of certiorari. Pet. App. 87a-100a. The relevant provisions of the Act, codified at 25 U.S.C. §§ 2701-2721, provide:

25 U.S.C. § 2710(d)(3):

> (A) Any Indian tribe having jurisdiction over the Indian lands upon which a class III gaming activity is being conducted, or is to be conducted, shall request the State in which such lands are located to enter into negotiations for the purpose of entering into a Tribal-State compact governing the conduct of gaming activities. Upon receiving such a request, the State shall negotiate with the Indian tribe in good faith to enter into such a compact.
>
> * * *

25 U.S.C. § 2710(d)(7):

> (A) The United States district courts shall have jurisdiction over --
>
> (i) any cause of action initiated by an Indian tribe arising from the failure of a State to enter into negotiations with the Indian tribe for the purpose of entering into a Tribal-State compact under paragraph (3) or to conduct such negotiations in good faith. . . .
>
> * * *

> (B)(i) An Indian tribe may initiate a cause of action described in subparagraph (A)(i) only after the close of the 180-day period beginning on the date on which the Indian tribe requested the State to enter into negotiations under paragraph (3)(A).

STATEMENT OF THE CASE

A. The Indian Gaming Regulatory Act

Petitioner Seminole Tribe of Florida is a federally recognized Indian tribe, duly organized under Section 16 of the Indian Reorganization Act, 25 U.S.C. § 476, 48 Stat. 984. The Tribe occupies and possesses broad powers of self-government over its Indian tribal lands, comprising five separate reservations in the State of Florida. In the area of gaming, however, this power of self-government is subject to the provisions of the Indian Gaming Regulatory Act (IGRA), Pub. L. No. 100-497, 102 Stat. 2467 (1988) (codified at 25 U.S.C. §§ 2701-2721; 18 U.S.C. §§ 1166- 1168).

The decision in *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987), holding that a state could not enforce its "civil/regulatory" gaming laws on Indian lands, prompted Congress to enact IGRA "to provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self sufficiency, and strong tribal governments." 25 U.S.C. § 2702(1). Congress, recognizing the need to "provide clear standards or regulations for the conduct of gaming on Indian lands," 25 U.S.C. § 2701(3), divided gaming into three separate classes and provided a different scheme of regulation for each.

Class I gaming, consisting of social or traditional games engaged in by individuals in connection with tribal ceremonies or

celebrations, 25 U.S.C. § 2703(6), was left to the exclusive regulatory control of the tribes. 25 U.S.C. § 2710(a)(1). Class II gaming, consisting of bingo games, games similar to bingo, and certain non-banking card games, 25 U.S.C. § 2703(7), was also left to the regulatory authority of the tribes, subject to the supervision of the newly-created National Indian Gaming Commission. 25 U.S.C. § 2710(a)(2). Class III gaming, defined as all gaming that does not fall within the class I and II definitions, 25 U.S.C. § 2703(8), and including various kinds of casino gaming such as banking card games and slot machines, was made subject to tribal and state joint regulation through the complex statutory scheme which is the genesis of this case.

Class III gaming on Indian lands is lawful only if authorized by a tribe located in a state which "permits such gaming," and when "conducted in conformance with a Tribal-State compact entered into by the Indian tribe and the State. . . ." § 2710 (d)(1); Pet. App. 93a. Congress provided various remedies to the tribes in the event a state refuses either to enter into compact negotiations or to negotiate in good faith. First, IGRA provides that if a state fails to negotiate in good faith a federal court may order the state to conclude a compact within sixty days. § 2710(d)(7)(iii); Pet. App. 98a. The jurisdictional statute provides:

> (A) The United States district courts shall have jurisdiction over—
>
> (i) any cause of action initiated by an Indian tribe arising from the failure of a State to enter into negotiations with the Indian tribe for the purpose of entering into a Tribal-State compact under paragraph (3) or to conduct such negotiations in good faith. . . .

* * *

> (B)(i) An Indian tribe may initiate a cause of action described in subparagraph (A)(i) only after the close of the 180-day period beginning on the date on which the Indian tribe requested the State to enter into negotiations under paragraph (3)(A).

§ 2710(d)(7)(A)(i) & (B)(i); Pet. App. 97a.

IGRA recognizes that agreement on a compact may not be reached even after an order to conclude a compact is entered by the court. The Act provides that, in the event the parties do not execute a compact within the sixty-day period provided by court order, they shall then each submit to a court-appointed mediator a proposed compact which represents that party's last best offer for a compact. 25 U.S.C. § 2710(d)(7)(B)(iv); Pet. App. 98a. The mediator shall select the proposed compact which best comports with IGRA, other applicable federal law, and the findings of the court, and shall submit that compact to the state and the tribe. 25 U.S.C. § 2710(d)(7)(B)(iv) & (v); Pet. App. 98a. If the state consents to the mediator's proposed compact within sixty days, it becomes the applicable tribal-state compact as if entered into by the parties. 25 U.S.C. § 2710(d)(7)(B)(vi); Pet. App. 98a. If not, the mediator shall notify the Secretary of the Interior, who shall prescribe, in consultation with the tribe and consistent with the proposed compact selected by the mediator and applicable law, procedures under which class III gaming may be conducted. § 2710 (d)(7)(B)(vii); Pet. App. 98a.

B. The Seminole Tribe Compact Request

In January 1991, the Seminole Tribe wrote to Florida Governor Lawton Chiles requesting the commencement of negotiations, pursuant to IGRA, for a tribal-state compact governing the conduct of class III gaming activities on tribal

lands. Pet. App. 44a; J.A. 21a. On March 4, 1991, the Tribe submitted a proposed compact providing for tribal operation of poker, and all video, electronic and computer-aided games which duplicate poker, bingo, pull-tabs, lotto, punchboards, tip jars, instant bingo and other games similar to bingo. J.A. 26a-35a. Although the Tribe contended casino-type games were permitted in Florida, it excluded them from its initial proposal. In a letter accompanying the proposal, the Tribe stated that it was making a conservative request to expedite the compacting process. J.A. 24a-25a. On May 24, 1991, the Governor's General Counsel responded for the Governor, rejecting all of the Tribe's proposed games with the exception of poker. Pet. App. 45a; J.A. 36a-39a.

The Tribe then wrote to Governor Chiles to express its dissatisfaction and to request the Governor's personal involvement in the compact negotiations. J.A. 16a; Complaint ¶ 17. J.A. 40a. Soon thereafter, the Tribe also submitted a legal memorandum to the State, providing specific support for the proposed compact provisions. Pet. App. 45a.

In August 1991, the Governor's General Counsel reasserted that the State would not negotiate regarding any form of gaming not expressly allowed by State statutes, nor would the State negotiate regarding any machine gaming or any form of casino gaming. J.A. 17a; Complaint ¶ 20. The State expressed a willingness to negotiate only poker and other card games, raffles, parimutuel wagering on dog and horse racing, and jai alai. *Id.* Tribal and State representatives met in September 1991, but the State refused to change its position regarding the scope of the negotiations. Pet. App. 45a-46a.

Invoking the remedy authorized by 25 U.S.C. § 2710(d)(7)(A)(i) & (B)(i), Pet. App. 97a, the Tribe filed suit against the State of Florida and its Governor on September 19, 1991. J.A. 12a-42a. The Tribe alleged that the State and the Governor had

"failed to respond in good faith to the Tribe's request for compact negotiations and had not conducted those negotiations in good faith." (Complaint at ¶ 24; J.A. 18a). The Tribe sought (1) an order that the State and the Tribe conclude a compact within sixty days, and if no compact had been concluded at the end of that time, that the court appoint a mediator; and (2) a declaratory judgment that IGRA requires the State to negotiate with the Tribe concerning all class III games, including casino gaming. J.A. 18a-19a.

After filing an answer (J.A. 43a-48a), the State and the Governor moved to dismiss the suit on Eleventh Amendment sovereign immunity grounds. J.A. 49a-51a. The district court denied their motion:

> Given Congress' plenary authority over Indian relations, explicitly noted in the text of the Constitution at Article I, §8, cl. 3, and the uniquely federal issues raised when such authority is exercised, considered in conjunction with the principles enunciated by the Supreme Court in *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 109 S.Ct. 2273, 105 L.Ed.2d 1 (1989), we conclude that Congress, when acting pursuant to the Indian Commerce Clause, has the power to abrogate the States' immunity.

Seminole Tribe of Florida v. Florida, 801 F. Supp. 655, 658 (S.D. Fla. 1992); Pet. App. 26a, 32a. The State and the Governor sought interlocutory review in the Eleventh Circuit.[1]

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1. Jurisdiction in the court of appeals was based upon the collateral order doctrine of *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949). See *Griesel v. Hamlin*, 963 F.2d 338 (11th Cir. 1992) (denial of Eleventh (Cont'd)

That court consolidated the *Seminole* case with the appeals from *Poarch Band of Creek Indians v. Alabama*. There, the Alabama district court had granted the State's and the Governor's Eleventh Amendment motions to dismiss. 776 F. Supp. 550 (S.D. Ala. 1991); 784 F. Supp. 1549 (S.D.Ala. 1992). The Eleventh Circuit reversed the *Seminole* decision and affirmed the *Poarch Creek* decisions, concluding that the Indian Commerce Clause does not provide Congress with the power to abrogate the States' Eleventh Amendment immunity. *Seminole Tribe of Florida v. Florida*, 11 F.3d 1016, 1028 (11th Cir. 1994); Pet. App. 1a, 22a.

The Eleventh Circuit found that Congress clearly "manifested its intent to abrogate the states' immunity" under IGRA, *id.* at 1024; Pet. App. 14a, and that "Congress enacted IGRA solely under the Indian Commerce Clause," but that the Indian Commerce Clause does not permit Eleventh Amendment abrogation. The court rejected the relevance of *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989), questioning its viability and drawing a distinction between Congress' powers under the Interstate Commerce Clause (*Union Gas*) and the Indian Commerce Clause. 11 F.3d at 1026-28; Pet. App. 18a-22a.

(Cont'd)
Amendment immunity is an immediately appealable order); *Puerto Rico Aqueduct and Sewer Auth. v. Metcalf & Eddy, Inc.*, 113 S. Ct. 684 (1993) (collateral order doctrine permits immediate appellate review of orders denying claim of Eleventh Amendment immunity).

Simultaneously with the appeal on the immunity issues in the Eleventh Circuit, the parties filed cross-motions for summary judgment in the district court on the question of whether the State of Florida had fulfilled its obligation under IGRA to conduct compact negotiations in good faith. Pet. App. 43a. On September 22, 1993, the court granted the State's motion and denied the Tribe's, ruling that the State had negotiated in good faith. Pet. App. 43a, 83a. Review of the final judgment of the district court is pending in the Court of Appeals for the Eleventh Circuit (No. 93-5256), but has been stayed pending disposition of the Eleventh Amendment issue presented here. Pet. App. 84a.

The court of appeals noted that its conclusion regarding Congress' power to abrogate the Eleventh Amendment conflicted with the Eighth Circuit decision in *Cheyenne River Sioux Tribe v. South Dakota*, 3 F.3d 273 (8th Cir. 1993) (11 F.3d at 1023, n.5; Pet. App. 12a, n.5), and noted the conflict among district courts on the same issues. *Id.* at 1024, nn. 6 & 7; Pet. App. 13a, nn. 6 & 7.

The Eleventh Circuit also refused to apply the doctrine of *Ex parte Young*, 209 U.S. 123 (1908), to sustain the Tribe's suit against the Governor. First, the court viewed negotiation of a compact as discretionary, since IGRA leaves the terms of a compact to the discretion of the parties and provides an alternative procedure should the state refuse to negotiate at all. 11 F.3d at 1028; Pet. App. at 23a. Second, the court viewed the suit as one which was "in reality against the state itself," since IGRA authorizes suits against the state to compel the state to conclude a compact. *Id.* at 1029; Pet. App. at 24a.

After rejecting all bases for federal jurisdiction under IGRA's aegis, the court of appeals applied severance principles and carved out a remedy "for an Indian tribe faced with a state that not only will not negotiate in good faith, but also will not consent to suit." 11 F.3d at 1029; Pet. App. 25a. The court concluded that the Tribe's remedy was to notify the Secretary of the Interior of the State's failure to negotiate and objection to jurisdiction, and "[t]he Secretary then may prescribe regulations governing class III gaming on the tribe's lands." *Id.* That remedy prompted Florida's motion for rehearing, despite the State's Eleventh Amendment success. Rehearing was denied. Pet. App. 86a.

The Seminole Tribe filed a petition for a writ of certiorari seeking review of the court of appeals' decision that the Eleventh Amendment barred the Tribe's suit. In a cross-petition, Florida and its Governor sought review of that portion of the decision giving the Secretary of the Interior power to prescribe

regulations. (No. 94-219, *pending*). The Court granted the Seminole Tribe's petition with respect to both questions presented — Congress' power to abrogate the Eleventh Amendment under the Indian Commerce Clause, and the availability of prospective injunctive relief under *Ex parte Young*.

SUMMARY OF ARGUMENT

1. The Indian Commerce Clause, art. I, § 8, cl. 3, U.S. Const., gives Congress "plenary power to legislate in the field of Indian affairs." *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 192 (1989). The Indian Commerce Clause was the product of colonial history and ambiguous language in the Articles of Confederation which failed to resolve the relationship between the emerging national government, the states, and the Indian tribes. The power ultimately contained in Article I, Section 8, Clause 3 made "Indian relations . . . the exclusive province of federal law." *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 234 (1985); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 561 (1832).

The Indian Commerce Clause provides Congress with the plenary power to abrogate states' Eleventh Amendment immunity. That abrogation in the Indian Gaming Regulatory Act, allowing tribes to sue states for prospective injunctive relief to compel compliance with the Act's good faith negotiation requirement, is consistent with the Constitution and with *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989). The plurality opinion in *Union Gas*, acknowledging Congress' power to abrogate under the Interstate Commerce Clause to allow private suits for monetary damages, supports Congress' authorization of injunctive relief for tribes that seek the benefits and guarantees created by the Indian Gaming Regulatory Act.

2. Under the doctrine of *Ex parte Young*, 209 U.S. 123

(1908), the Court may order the Governor to comply with IGRA if IGRA did not successfully abrogate the State's Eleventh Amendment immunity. *Ex parte Young* allows federal courts to order state officials to comply with federal law. "[T]he *Young* doctrine has been accepted as necessary to permit the federal courts to vindicate federal rights and hold state officials responsible to 'the supreme authority of the United States.' " *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 105 (1984) (*quoting Ex parte Young*, 209 U.S. at 160). The Tribe's demand under 25 U.S.C. §2710(d)(7)(B)(iii) (Pet. App. 98a), that the Governor be ordered to enter into a compact with the Tribe within sixty days, is a claim for prospective injunctive relief to compel a state official to comply with federal law, and is thus within *Ex parte Young*.

The court of appeals erred in holding that *Ex parte Young* does not apply because IGRA imposes discretionary duties on the State. 11 F.3d at 1028-29; Pet. App. 23a-24a. The discretion allowed the State and its officers, in defining the terms of a proposed compact, is limited by the requirement that they "negotiate with the Indian tribe in good faith to enter into such a compact." 25 U.S.C. § 2710(d)(3)(A); Pet. App. 95a; *supra* at p. 3. *Ex parte Young* and later cases distinguish between an official's discretion and limitations on that discretion, and allow suits to enforce limitations on discretion. *See Ex parte Young*, 209 U.S. at 159 ("An injunction to prevent him from doing that which he has no legal right to do is not an interference with the discretion of an officer.").

The court of appeals reasoned incorrectly that this suit seeking prospective injunctive relief against the Governor is in reality one against the State because IGRA refers only to the state and not to its officers. 11 F.3d at 1029; Pet. App. 24a. A state can act only through its officers; all *Ex parte Young* actions require state officials, in their official capacities, to comply with federal

law applicable to the "States," notwithstanding the "obvious impact on the State itself." *Pennhurst*, 465 U.S. at 105. *Ex parte Young* did not require that the official who is sued be named in the statute as the person whose duty it is to enforce the statute. The only requirement is that "the state officer by virtue of his office has some connection with the enforcement of the act," regardless of the source of that connection. 209 U.S. at 157. That criterion is satisfied here, since it is undisputed that the Governor entered into compact negotiations with the Tribe and had the authority to do so.

3. *Hans v. Louisiana*, 134 U.S. 1 (1890), should be revisited, at least as to congressionally authorized tribal suits against states. *Hans*, which expanded the plain language of the Eleventh Amendment to encompass all suits brought against the states in federal courts, has been the subject of repeated criticism within the Court. *Welch v. Texas Dept. of Hwys. and Pub. Transp.*, 483 U.S. 468, 496 (1987) (Brennan, J., dissenting); *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 788 (1991) (Blackmun, J., dissenting). Given the Article I, Section 8, Clause 3 Indian Commerce Clause purpose of limiting state sovereignty in Indian affairs, and the Article III grant of judicial power subject to Congress' authority to promote national peace and harmony, Congress' power to authorize tribal suits against states is necessary and unsurprising. Since the text of the Eleventh Amendment does not bar such suits, and since the states surrendered power to the federal government in Indian matters, *Hans v. Louisiana* should not be read to encompass congressionally authorized tribal actions against the states.

ARGUMENT

I.

CONGRESS HAS THE POWER TO ABROGATE THE STATES' ELEVENTH AMENDMENT IMMUNITY, PURSUANT TO THE INDIAN COMMERCE CLAUSE.

The suit by the Seminole Indian Tribe against the State of Florida and its Governor sought declaratory and prospective injunctive relief. The action and the relief requested were expressly authorized by the Indian Gaming Regulatory Act, 25 U.S.C. § 2710(d)(7)(A)(i) and (B)(i). The State maintains that the Eleventh Amendment prohibits the exercise of federal jurisdiction. Sustaining that position would destroy the delicate federal/tribal/ state balance sought by the Act.

The district court denied the State's motion to dismiss on Eleventh Amendment grounds. Pet. App. 26a. Reversing, the Court of Appeals for the Eleventh Circuit concluded that the Indian Commerce Clause does not provide a basis for Congress to abrogate the states' Eleventh Amendment immunity. In contrast, the Eighth, Ninth and Tenth Circuits have held that under the Indian Commerce Clause Congress does have the power to abrogate that immunity. *Cheyenne River Sioux Tribe v. State of South Dakota,* 3 F.3d 273 (8th Cir. 1993); *Spokane Tribe v. Washington,* 28 F.3d 991 (9th Cir. 1994), *petition for cert. filed* No. 94-357, 63 U.S.L.W. 3161, Aug. 29, 1994; *Ponca Tribe of Oklahoma v. State of Oklahoma,* 37 F.3d 1422 (10th Cir. 1994), *petition for cert. filed* Nos. 94-1029, 1030, 63 U.S.L.W. 3477, Dec. 9, 1994.

This Court has not decided whether Congress, under the Indian Commerce Clause, can abrogate Eleventh Amendment immunity. *Blatchford v. Native Village of Noatak,* 501 U.S.

775 (1991), held that 28 U.S.C. § 1362 – the Indian tribe jurisdictional statute – was not a congressional abrogation of Eleventh Amendment immunity because it lacked language indicating Congress' intent to do so. *Id.* at 788.[2] *Blatchford* did not address the question of whether Congress can abrogate Eleventh Amendment immunity pursuant to the Indian Commerce Clause. *Id. Blatchford's* finding that the Eleventh Amendment precludes an Indian tribe's federal court suit for monetary relief against a state left undecided the question of whether equitable relief is available against a state:

> Finally, respondents argue that even if the Eleventh Amendment bars their claim for damages, they still seek injunctive relief, which the Eleventh Amendment would not bar. The Court of Appeals, of course, did not address this point, and we leave it for that court's initial consideration on remand.

Id. at 788. Mootness obviated the inquiry on remand. *Native Village of Noatak v. Blatchford,* 38 F.3d 1505 (9th Cir. 1994) (appeal after remand).

The Seminole Tribe contends that the Indian Commerce Clause does provide a basis for abrogation; that Congress unequivocally intended to and did abrogate Eleventh Amendment immunity *via* 25 U.S.C. § 2710(d)(7)(A)(i); and that even if abrogation was not authorized, the Eleventh Amendment does not bar a suit against an officer of a state for declaratory and injunctive relief to compel compliance with federal law.

The Eleventh Amendment provides:

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2. That decision was also based upon a finding that there was no mutuality of waiver between states and tribes in the plan of convention, as there was among the states. 501 U.S. at 782.

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

As interpreted in a line of cases beginning with *Hans v. Louisiana,* 134 U.S. 1 (1890), absent abrogation, the Eleventh Amendment has been read to protect states from all suits in federal court unless the state has consented "either expressly or in the 'plan of convention.' " *Blatchford,* 501 U.S. at 779 (citations omitted).

Here, the State did not expressly consent to suit, and *Blatchford* precludes the Seminole Tribe from arguing state consent in "the plan of convention." *Id.* at 782. The Tribe invites the Court to revisit *Hans*, at least on a limited basis, an invitation not made by the Native Village governments in *Blatchford. Id.* at 779. That argument, made in Point III *infra* at p. 31, draws from the often articulated minority view that the Eleventh Amendment does not apply "outside the context of State/citizen and State/alien diversity suits." *See Blatchford,* 501 U.S. at 788 (Blackmun, J., dissenting, joined by Marshall and Stevens, JJ.). *Hans* therefore should not be read to create an Eleventh Amendment bar to an Indian tribe's suit seeking "to vindicate federal rights against a State." *Id.*

However, *Hans* need not be considered if the Indian Commerce Clause provides Congress with the power to abrogate States' immunity, or if *Ex parte Young,* 209 U.S. 123 (1908), permits the Seminole Tribe's suit against the Governor of Florida.

A. Article I Abrogation Power

Fitzpatrick v. Bitzer, 427 U.S. 445 (1976), recognized Congress' power to abrogate Eleventh Amendment immunity pursuant to Section 5 of the Fourteenth Amendment. The *Pennsylvania v. Union Gas Co.,* 491 U.S. 1 (1989), plurality held that pursuant to the Interstate Commerce Clause, Congress has the power to abrogate Eleventh Amendment immunity in a suit against the State for monetary relief.

The Eleventh Circuit concluded that *Union Gas* cannot be applied to the Indian Commerce Clause because "the different purposes underlying the two clauses mandate they be treated distinctly." Pet. App. 21a. The court of appeals believed that the Interstate Commerce Clause's *raison d'etre* — limiting the states to maintain free trade among them — carries more power to abrogate than does the Indian Commerce Clause, despite the fact that the Indian Commerce Clause's "central function . . . is to provide Congress with *plenary* power to legislate in the field of Indian affairs." *Cotton Petroleum Corp. v. New Mexico,* 490 U.S. 163, 192 (1989) (emphasis supplied).[3]

There is no principled basis for finding that congressional power under the Indian Commerce Clause is less than that conferred by the Interstate Commerce Clause. *See Spokane Tribe v. Washington,* 28 F.3d at 997 (9th Cir. 1994). Indeed, Congress' plenary power over Indian affairs lends more, not less, credence to the argument that abrogation under the Indian Commerce Clause is within the power of Congress.

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3. The court of appeals rejected the Interstate Commerce Clause as an additional basis for enacting the Indian Gaming Regulatory Act. Pet. App. 16a-17a. The *amicus curiae* Briefs of the National Indian Gaming Association, *et al.*, and the Miccosukee Tribe of Florida, develop the Interstate Commerce Clause basis for IGRA's enactment. Under that argument, *Union Gas* requires reversal of the decision below.

Congress' ability to abrogate Eleventh Amendment immunity must be premised upon "a valid exercise of power." *Green v. Mansour,* 474 U.S. 64, 68 (1985). The source of the power must be an affirmative constitutional grant of power to Congress. *See Garcia v. San Antonio Metro. Transit Auth.,* 469 U.S. 528 (1985):

> The States unquestionably do "retai[n] a significant measure of sovereign authority" [but] . . . [t]hey do so, however, only to the extent that the Constitution has not divested them of their original powers and transferred those powers to the Federal Government.

Id. at 549 (citation omitted).

The Article I, Section 8, Clause 3 plenary federal power to "regulate commerce . . . with the Indian tribes" is exclusive: "With the adoption of the Constitution, Indian relations became the exclusive province of federal law." *County of Oneida v. Oneida Indian Nation,* 470 U.S. 226, 234 (1985). The constitutional provision was the product of dissatisfaction and discord caused by an ambiguity in Article IX (4) of the Articles of Confederation, which allowed some states to argue that their Indian trade powers were unencumbered by federal authority. *Worcester v. Georgia,* 31 U.S. (6 Pet.) 515, 559 (1832).

> Madison cited the National Government's inability to control trade with the Indians as one of the key deficiencies of the Articles of Confederation, and urged adoption of the Indian Commerce Clause, Art. I, sec. 8, cl. 3, that granted Congress the power to regulate trade with the Indians.

County of Oneida v. Oneida Indian Nation, 470 U.S. 226, 234 n.4 (1985).

Ratification of the Constitution, and the cure effected by Article I, Section 8, Clause 3, solved a problem which had plagued colonial history.[4] All doubts were removed: Congress has exclusive plenary power to regulate commerce with Indian Tribes.

> These powers comprehend all that is required for the regulation of our intercourse with the Indians. They are not limited by any restrictions on their free actions. The shackles imposed on this power, in the [articles of] confederation, are discarded.

Worcester v. Georgia, 31 U.S. at 559.

While the Indian Commerce Clause is antecedent to the Eleventh Amendment, abrogation power under that Clause is

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4. The Article IX (4) problem was its last proviso:

> The United States in Congress assembled shall also have the sole and exclusive right and power of regulating the trade and managing all affairs with the Indians, not members of any of the States, provided that the legislative right of any state within its own limits be not infringed or violated.

James Madison viewed this division of powers as "absolutely incomprehensible" and an "endeavor to accomplish impossibilities." The Federalist, No. 42, p. 284 (J. Cooke ed. 1961). He advocated the Indian Commerce Clause because under it, "[t]he regulation of commerce with the Indian tribes is very properly unfettered from two limitations in the articles of confederation, which render the provision obscure and contradictory." *Id.*

consistent with constitutional history and compatible with case law. The *Union Gas* plurality held that the Interstate Commerce Clause provided the power to render states liable in private suits for money damages. Here, the Indian Commerce Clause provides an even stronger foundation for Congress' ability to subject states to suits by Indian tribes for prospective injunctive relief. That should be no surprise to the states:

> These Indian tribes . . . owe no allegiance to the States, and receive from them no protection. Because of the local ill feeling, the people of the States where they are found are often their deadliest enemies. From their very weakness and helplessness, so largely due to the course of dealing of the Federal Government with them and the treaties in which it has been promised, there arises the duty of protection, and with it the power. This has always been recognized by the Executive and by Congress, and by this court, whenever the question has arisen.

United States v. Kagama, 118 U.S. 375, 383-84 (1886).

The abrogation power must be available under the Indian Commerce Clause, in order to protect the tribes from state action denying federally guaranteed rights. This is particularly true where the states' limited authority to act is entirely derived from the statute guaranteeing the tribal rights. The states are protected from undue congressional action by their representation in Congress. *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. at 550-51:

> [T]he principal and basic limit on the federal commerce power is that inherent in all

> congressional action — the built-in restraints that our system provides through state participation in federal governmental action. The political process ensures that laws that unduly burden the States will not be promulgated.

Id. at 556. The states' representatives in Congress protect the states; the tribes have no representation in Congress, and rely upon the federal government to protect the tribes from the states. Congress' enactment of IGRA and its federal court injunctive remedy is consistent with the political balance of powers between the federal government, the states, and the tribes.[5]

B. The Eleventh Circuit's "Private Activity" Analysis Is Incorrect.

The decision below sought to limit the *Union Gas* abrogation power to situations where "the states partake in an activity typical of private individuals." Pet. App. 22a. Distinguishing *Parden v. Terminal Railway of Alabama*, 377 U.S. 184 (1964), the court of appeals posited Pennsylvania's hazardous waste site land use operations and Alabama's for-profit railroad operation to be like those of private citizens, and therefore subject to commerce power abrogation:

> We believe the Supreme Court's jurisprudence clearly evinces an intent to

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5. IGRA allows only injunctive relief. Congress' distinction between damages and injunctive relief weighs heavily in favor of Eleventh Amendment abrogation. *Hess v. Port Auth. Trans-Hudson Corp.*, 115 S. Ct. 394, 404 (1994): "[T]he impetus for the Eleventh Amendment [is] the prevention of federal court judgments that must be paid out of a State's treasury." Here, the states' representatives in Congress fashioned a remedy consistent with the core values of the Eleventh Amendment and the Indian Commerce Clause.

> allow federal jurisdiction over states only where the state's conduct is outside the typical realm of state authority.
>
> * * *
>
> Thus, even if *Union Gas*' reasoning were to give Congress abrogation power under the Indian Commerce Clause *in general,* we would hold that Congress may not abrogate when it legislates in an area typically reserved to the states (such as negotiating regulations with Indian tribes).

Pet. App. 21a-22a (emphasis in original).

Neither the cases cited by the court below, nor the Constitution, which gives the federal government the paramount and plenary power to treat with tribes (art. I, § 10; art. II, § 2, cl. 2, U.S. Const.), supports the Eleventh Circuit's rationale. *Parden* and *Union Gas* do not ascribe any Eleventh Amendment significance to the functions performed by the states in those cases. And, neither precedent nor practice supports a notion that states' negotiations with tribes have ever been viewed as matters "typically reserved to the states." Indeed, the exclusivity of the federal power over Indian affairs leaves little doubt that "negotiating regulations with Indian tribes" is congressionally circumscribed, and is certainly not "reserved to the states." *California v. Cabazon Band of Mission Indians,* 480 U.S. 202 (1987).

No principled reason supports the Eleventh Circuit's attempt to distinguish *Union Gas* on a private/public activity theory. Either Congress has the power to abrogate, or it lacks that power. If the Eleventh Amendment is not subject to abrogation under the

Indian Commerce Clause, then the federal statutory rights which prompted the Seminole Tribe's suit for prospective injunctive relief are alternatively cognizable in federal court under the doctrine of *Ex parte Young*.

II.

UNDER *EX PARTE YOUNG,* A FEDERAL COURT MAY REQUIRE THE GOVERNOR TO NEGOTIATE IN GOOD FAITH PURSUANT TO THE INDIAN GAMING REGULATORY ACT.

A second and independent ground for reversing the judgment of the Eleventh Circuit stems from the fact that the Seminole Tribe sued not only the State of Florida but also the Governor of Florida. The relief sought against the Governor was a prospective injunction to compel him to obey a federal statutory duty to negotiate in good faith with the Seminole Tribe.[6] In this situation, *Ex parte Young,* 209 U.S. 123 (1908), makes plain that, whatever Eleventh Amendment immunity from suit the State of Florida might have, such immunity is not shared by the Governor, at least where only prospective relief is sought against him. *Edelman v. Jordan,* 415 U.S. 651 (1974).

The Eleventh Circuit held that the doctrine of *Ex parte Young* is inapplicable in this case for two reasons: (1) the doctrine cannot be used to compel a state official to perform discretionary acts, such as negotiating the terms of a contract, and (2) the

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6. The Governor of Florida, acting under his authority as chief executive officer of the state, entered into compact negotiations with the Seminole Tribe. In their answer to the complaint, defendants asserted that "Defendants State of Florida and Lawton Chiles, in his capacity as Governor of the State of Florida, have negotiated in good faith" with the Tribe concerning class III gaming. J.A. 46a. *See* Fla. Const., art. IV, § 1(a) (vesting "supreme executive power" in the governor).

doctrine does not apply if the suit in reality is a suit against the State itself. The Eleventh Circuit erred. IGRA mandates good faith negotiations, not contract terms. Stripped of their fiction, all *Ex parte Young* actions *are* suits against states. The court of appeals' view of duty, discretion and state action does not survive analysis.

A. *Ex parte Young*

The doctrine of *Ex parte Young*, 209 U.S. 123 (1908), allows prospective injunctive relief to compel the Governor's compliance with IGRA mandates. The doctrine is an "important exception" to the general Eleventh Amendment bar to suits nominally against state officers. *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 102 (1984). Such suits may proceed because:

> [r]ather than defining the nature of Eleventh Amendment immunity, *Young* and its progeny render the Amendment wholly inapplicable to a certain class of suits. Such suits are deemed to be against officials and not the States. . . .

Puerto Rico Aqueduct and Sewer Auth. v. Metcalf & Eddy, Inc., 113 S. Ct. 684, 688-89 (1993).

Ex parte Young upheld a federal court injunction preventing the Minnesota Attorney General from enforcing an unconstitutional state statute. The Eleventh Amendment did not bar the suit because an unconstitutional state statute is "void" and cannot "impart to [the officer] any immunity from responsibility to the supreme authority of the United States." 209 U.S. at 159-60.

Ex parte Young's role in ensuring the supremacy of federal

law has been consistently reaffirmed by this Court. *See, e.g., Edelman v. Jordan*, 415 U.S. 651 (1974); *Pennhurst*, 465 U.S. 89. As *Pennhurst* explained, "*Edelman* held that when a plaintiff sues a state official alleging a violation of federal law, the federal court may award an injunction that governs the official's future conduct, but not one that awards retroactive monetary relief." 465 U.S. at 102-03. *Pennhurst* specifically approved the "fiction" of allowing relief in official-capacity actions against state officials, notwithstanding the "obvious impact on the State itself," because "the *Young* doctrine has been accepted as necessary to permit the federal courts to vindicate federal rights and hold state officials responsible to 'the supreme authority of the United States.' " *Id.* at 104-105 (quoting *Ex parte Young*, 209 U.S. at 160).[7]

The Seminole Tribe's suit, seeking injunctive relief to compel a state official to comply with federal law, 25 U.S.C. § 2710(d)(7)(B)(iii), falls squarely within the doctrine of *Ex parte Young*. It seeks only a prospective remedy to end a continuing violation of federal law – a remedy that does nothing more than vindicate the federal interest in assuring the supremacy of that law.

B. The Relief Requested Would Not Compel a Discretionary Act.

The court of appeals held that *Ex parte Young* does not apply because IGRA imposes "discretionary" duties on the State which cannot be compelled under that doctrine. Pet. App. 23a-24a. That rationale fails to recognize that IGRA requires the state and its

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7. *See Puerto Rico Aqueduct and Sewer Auth.*, 113 S.Ct. 684, 688: "The doctrine of *Ex parte Young*, which ensures that state officials do not employ the Eleventh Amendment as a means of avoiding compliance with federal law, is regarded as carving out a necessary exception to Eleventh Amendment immunity." *See also Green v. Mansour*, 474 U.S. 64, 68 (1985).

officials to adhere to a statutory standard of "good faith." Violation of that non-discretionary statutory requirement can be cured under *Ex parte Young*.

IGRA provides that in negotiations for a compact governing class III gaming, "the State shall negotiate with the Indian tribe in good faith to enter into such a compact." 25 U.S.C. § 2710(d)(3)(A); Pet. App. 95a.[8] IGRA also provides that if a tribe files suit alleging a violation by the state of these requirements and the court finds that the state has failed to negotiate in good faith, it "shall order the State and the Indian Tribe to conclude such a compact within a sixty-day period." 25 U.S.C. § 2710(d)(7)(B)(iii); Pet. App. 98a. If a compact is not concluded within the sixty-day period, the court will then order mediation under 25 U.S.C. § 2710(d)(7)(B)(iv), Pet. App. 98a — an order which the state can disregard if it is willing to give up the limited right to regulate Indian gaming granted by Congress through the compact process.[9]

The Seminole Tribe sought the remedy provided by IGRA (J.A. 18a) because of the State's refusal to negotiate over various

8. As explained at p. 5, *supra*, IGRA provides that class III gaming may be conducted on Indian lands only if "conducted in conformance with a Tribal-State compact entered into by the Indian Tribe and State...." 25 U.S.C. § 2710(d)(1); Pet. App. 93a. That provision of IGRA was intended to delegate to the states an optional role in regulating Indian gaming — a role they did not have under this Court's decision in *Cabazon*, 480 U.S. 202. However, Congress did not give the states the power to block class III gaming by refusing to enter into gaming compacts. Rather, it enacted provisions requiring the states to negotiate in good faith, and providing for remedies in the event the states refused.

9. If the state refuses to participate, the mediation proceeds without it. The tribe's proposal would be the one selected by the mediator and used by the Secretary of the Interior as the basis for prescribing procedures to regulate tribal gaming. 25 U.S.C. § 2710(d)(7)(B)(iv); Pet. App. 98a; *see supra* at p. 6.

forms of gaming which the State "permits" its citizens to conduct.[10] Granting the relief sought would not compel a discretionary act because the obligation to negotiate in good faith is not discretionary; it is a statutory duty imposed on the state and its officials. *Cf. NLRB v. Insurance Agents' Int'l*, 361 U.S. 477, 487-88 (1960) (statutory requirement of "good faith" negotiations creates a "duty on the parties," notwithstanding the wide discretion afforded with respect to terms). *See also NLRB v. Katz*, 369 U.S. 736 (1962); R. Gorman, *Labor Law*, Ch. XX, The Duty to Bargain in Good Faith, pp. 399-495 (1976).

The court of appeals confused the Governor's discretion regarding the terms to be included in a compact with his plain duty under IGRA to negotiate in "good faith." The Eleventh Circuit's premise, that discretion in the exercise of statutory duties precludes judicial enforcement of an express limitation on that discretion imposed in the same statute (Pet. App. 23a-24a), is not supported by *Ex parte Young*. There, the Court recognized the distinction between an officer's discretion and limitations on that discretion. Attorney General Young had contended that the court could not control his discretion whether or not to enforce the challenged state statute. 209 U.S. at 158. The Court acknowledged the general rule of noninterference with an officer's discretion, but upheld the injunction: "An injunction to prevent him from doing that which he has no legal right to do is not an interference with the discretion of an officer." *Id.* at 159.

Moreover, *Ex parte Young's* reference to the general rule of

10. The Tribe argued below that the Governor failed to negotiate in good faith by refusing to negotiate various forms of casino gaming that the State "permits" within the meaning of 25 U.S.C. § 2710(d)(1)(B). The district court's summary judgment ruling that the State did not, in fact, "permit" such gaming and is not required to negotiate for those games, Pet. App. 43a, is on appeal to the Eleventh Circuit. That appeal has been stayed pending resolution of this case. Pet. App. 84a.

noninterference with an officer's discretion, *id.* at 158, did not refer to the court's *jurisdiction* to grant injunctive relief against state officers notwithstanding the Eleventh Amendment, but to the quite different question of when any injunction is appropriate. In IGRA, Congress has made a determination that injunctive relief to enforce the duty to negotiate in good faith is appropriate. Therefore *Ex parte Young's* discussion of discretion has no application here.

Other cases have also recognized the distinction between intruding upon an official's discretion and enforcing limits placed on an official's discretion by statute or by the Constitution. *Work v. United States*, 267 U.S. 175 (1925), held that although a federal officer's discretion may not be controlled through mandamus, if his duty is "discretionary within limits," then "he may be controlled by injunction or mandamus to keep within them." *Id.* at 177.[11] *See also Heckler v. Chaney*, 470 U.S. 821, 834-35 (1985) (although federal agency decision whether to take enforcement action is generally discretionary, where Congress has limited that discretion, courts may enforce those limits under the Administrative Procedures Act, 5 U.S.C. § 701(a)(2)); *Silveyra v. Moschorak*, 989 F.2d 1012, 1014-15 (9th Cir. 1993) ("Even where an official's responsibilities are in some respects discretionary, mandamus is appropriate if 'statutory or regulatory standards delimiting the scope or manner in which such discretion can be exercised ... have been ignored or violated.' ") (quoting *Carpet, Linoleum and Resilient Tile Layers, Local Union No. 419 v. Brown*, 656 F.2d 564, 566 (10th Cir. 1981), and citing *Work*, 267 U.S. 175).

11. *Work* is relevant because the Court uses the same principles to determine whether sovereign immunity bars a suit against a federal official as it does to determine whether the Eleventh Amendment suit bars a suit against a state official. *Florida Dept. of State v. Treasure Salvors, Inc.*, 458 U.S. 670, 687 n.22 (1982).

The Eleventh Circuit found that "since IGRA provides a procedure should the state decide not to negotiate, even the mere question of whether the state should negotiate at all is subject to discretion." Pet. App. 23a-24a. But that construct ignores the plain duty IGRA imposes on the Governor to negotiate in good faith, a duty which cannot be avoided by the availability of remedial procedures should the Governor breach that duty. The relief sought by the Tribe is an order either to conclude a compact within sixty days, or to invoke the alternative procedure of mediation. *See supra* at p. 8.[12] The possibility that the Governor might ignore an order and allow the mediation to proceed without him does not affect the *Ex parte Young* analysis, or deprive the federal court of jurisdiction to provide the statutory relief.

C. The Governor May Be Ordered to Negotiate in Good Faith.

All *Ex parte Young* actions are, in reality, suits against the state, because they require state officials *in their official capacities* to comply with federal law, notwithstanding the "obvious impact on the State itself." *Pennhurst* at 104; *see also id.* at 105 (calling *Young* a "fiction," and noting the "well-recognized irony" that under *Ex parte Young* an official's unconstitutional conduct constitutes state action under the Fourteenth Amendment but not under the Eleventh Amendment).

The court of appeals' conclusion that the action is against the

12. While the Governor may ignore an order under 25 U.S.C. § 2710(d)(7)(B)(iii), Pet. App. 98a, to conclude a compact within sixty days, if he did he would be ordered to submit a proposed compact to mediation under 25 U.S.C. § 2710(d)(7)(B)(iv), Pet. App. 98a. That order would itself be allowable under *Ex parte Young*, either as a form of prospective injunctive relief or as ancillary to the earlier award of prospective injunctive relief (i.e., the order to compact within sixty days). *See Quern v. Jordan*, 440 U.S. 332, 349 (1979).

state, because IGRA imposes a duty on and remedies against "the State" and not state officials, (Pet. App. 24a), does nothing to undermine the applicability of the *Ex parte Young* doctrine. A state "can act only through its officials." *Pennhurst*, 465 U.S. at 114 n.25. In *Ex parte Young* and its progeny, the Court has repeatedly compelled state officials to comply with federal law limitations which are applicable by their terms to the *states*. *See, e.g., Milliken v. Bradley,* 433 U.S. 267, 288-90 (1977) (state officials ordered to comply with Equal Protection Clause of Fourteenth Amendment); *Edelman*, 415 U.S. at 654 & n.3 (state officials ordered to comply with federal regulations regarding "State plan" and "State-established time standards"). Simply put, federal mandates to a state are enforceable against the state officials who implement state action.

Ex parte Young rejected the argument that the official sought to be enjoined must be named in the statute as the official whose duty it is to act. The Court stated:

> In making an officer of the State a party defendant in a suit to enjoin the enforcement of an act alleged to be unconstitutional it is plain that such officer must have some connection with the enforcement of the act, or else it is merely making him a party as a representative of the State, and thereby attempting to make the State a party.
>
> It has not, however, been held that it was necessary that such duty should be declared in the same act which is to be enforced . . . . The fact that the state officer by virtue of his office has some connection with the enforcement of the act is the important and material fact, and whether it arises out of the general law, or is specially created by the act itself, is not material so long as it exists.

209 U.S. at 157.

In this case, it is undisputed that Governor Chiles entered into compact negotiations with the Seminole Tribe in his capacity as Governor. Having lawfully undertaken that responsibility, he cannot now invoke sovereign immunity in an effort to insulate himself from litigation to vindicate the federal rights guaranteed by the Indian Gaming Regulatory Act. If the Eleventh Amendment applies and renders the State immune, *Ex parte Young* provides a basis for relief against the Governor.

III.

HANS V. LOUISIANA SHOULD BE REVIEWED AND DEEMED NOT APPLICABLE TO SUITS BY INDIAN TRIBES AGAINST THE STATES.

Repeated calls for overruling *Hans v. Louisiana,* 134 U.S. 1 (1890), have been unsuccessful.[13] In this case *Hans* need not be reviewed if abrogation or *Ex parte Young* yields a reversal. If those arguments fail, Justice Brennan's dissent in *Atascadero State Hospital v. Scanlon,* 473 U.S. 234 (1985), is pertinent.

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13. *Blatchford v. Native Village of Noatak,* 501 U.S. 775, 788 (1991) (Blackmun, J., dissenting); *Dellmuth v. Muth,* 491 U.S. 223, 233 (1989) (Brennan, J., dissenting); *Welch v. Texas Dept. of Hwys. and Pub. Transp.*, 483 U.S. 468, 496 (1989) (Brennan, J., dissenting); *Papasan v. Allain,* 478 U.S. 265, 292 (1986) (Brennan, J., concurring in part and dissenting in part); *Green v. Mansour,* 474 U.S. 64, 74 (1985) (Brennan, J., dissenting); *Pennhurst State Sch. and Hosp. v. Halderman,* 465 U.S. 89, 140 (1984) (Stevens, J., dissenting). *See also* Vicki C. Jackson, *One Hundred Years of Folly: The Eleventh Amendment and the 1988 Term,* 64 S. Cal. L. Rev. 51 (1990); John J. Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation,* 83 Colum. L. Rev. 1889 (1983).

Justice Brennan called for a complete reexamination of *Hans*, concluding:

> [T]he current doctrine intrudes on the ideal of liberty under law by protecting the States from the consequences of their illegal conduct. And the decision obstructs the sound operation of our federal system by limiting the ability of Congress to take steps it deems necessary and proper to achieve national goals within its constitutional authority.

Id. at 302 (Brennan, J., dissenting, joined by Blackmun, Marshall and Stevens, JJ.). Here, the Court need not undo *Hans* altogether, but only consider its applicability to tribal suits brought under the Indian Commerce Clause, which uniquely present the federalism concerns warranting review of *Hans*. Protecting Indian tribes from state misconduct, insuring a safe and sound union by placing Indian matters in the hands of the central government, enforcing a textual constitutional commitment to the exclusive role of the national government in Indian affairs, are all important reasons for reviewing *Hans*.

Indeed, the role of the Indian Commerce Clause and the reasons why it evidences state acceptance of overriding congressional power can be gleaned from *Atascadero's* state sovereignty explanation of *Hans:*

> The Framers believed that the States played a vital role in our system and that strong State governments were essential to serve as a "counterpoise" to the power of the Federal Government. *See, e.g.*, The Federalist, No. 17, p. 107 (J. Cooke ed. 1961); The Federalist No. 46, p. 316 (J. Cooke ed. 1961).

Atascadero, 473 U.S. at 238-39, n.2. In contrast, the Framers recognized that the Indian Commerce Clause counteracted the powers of the states. The clause rejected "counterpoise" in favor of exclusive federal authority over Indian affairs. *Worcester v. Georgia; County of Oneida v. Oneida Indian Nation, supra.*

The language of Article III echoes the relinquishment of state sovereignty on which we focus. The original draft of Article III provided that "[t]he jurisdiction of the supreme tribunal shall extend . . . to such other cases, as the national legislature may assign, as involving the national peace and harmony. . . ." 2 M. Farrand, *Records of the Federal Convention of 1787*, pp. 146-147 (rev. ed. 1937). The jurisdiction was appellate, "except in...those instances, in which the legislature shall make it original." *Ibid. See Atascadero*, 473 U.S. at 263, n.14 (Brennan, J., dissenting). Ultimately the preamble to the Constitution articulated the quest for harmony: "We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility. . . ." Those principles were embodied in Article III, which as adopted, preserved the concepts of judicial and congressional powers designed to promote pacific relationships. In light of the troubled history of Indian/state relations, the combination of Article I, Section 8, Clause 3 and Article III provides strong evidence that the states acknowledged and accepted Congress' authority to create federal judicial remedies to effectuate its exclusive Indian commerce power.

The *Atascadero* reading of *Hans* — that the Eleventh Amendment "barred a citizen from bringing a suit against his own State in federal court, even though the express terms of the Amendment do not so provide," 473 U.S. at 238, is tied to the belief that "[t]he Constitution never would have been ratified if the States and their courts were to be stripped of their sovereign authority except as expressly provided by the Constitution itself." *Id.* at 239 n.2. Since the Constitution expressly provided

that the states were to be stripped of their powers over Indian tribes, and Article III expressly provided that the federal courts were to have jurisdiction over cases arising under the laws of the United States, it requires no reach to conclude that *Hans*' broad interpretation of the Eleventh Amendment does not apply to suits brought by Indian tribes pursuant to express congressional authorization. One can accept the long line of cases spawned by *Hans* which are said to stand for the proposition that " 'the fundamental principle of sovereign immunity limits the grant of judicial authority in Art. III,' *Pennhurst II,* 465 U.S. at 98," *Atascadero* at 243, n.3, and still find that, in the Indian Commerce Clause, the states recognized Congress' power *vis a vis* tribes, and Congress' ability to invoke federal judicial authority to enforce that power.

This is not to say that the states consented to being sued by tribes in the plan of convention. *Blatchford* bars that argument. 501 U.S. at 782. But the states did give up their sovereign rights to control their commerce with Indian tribes — empowering Congress to undertake that task at the same time the states empowered Congress to create federal question jurisdiction when domestic tranquility required it to do so. *Hans v. Louisiana's* rejection of the argument that the text of the Eleventh Amendment left the states subject to suit by its own citizens was not based on constitutionally created immunity. *Hans* relied on the principle that the Eleventh Amendment did not need to establish states' immunity because the judicial power did not contemplate such suits. *Hans,* 134 U.S. at 15. Thus the states' immunity is derived from the common law, independent of the Constitution. While Article III alone does not breach the immunity, *Hans* does not preclude Congress from explicitly authorizing the federal courts to hear an Indian tribe's suit against a state.

Congress' explicit authorization is beyond peradventure

here. The IGRA congressional abrogation of State sovereign immunity is both specific and "unmistakably clear in the language of the statute." *Dellmuth v. Muth,* 491 U.S. 223, 228 (1989) (*citing Atascadero State Hosp. v. Scanlon*, 473 U.S. 232, 242 (1985)). The statute provides:

> The United States district courts shall have jurisdiction over . . . any cause of action initiated by an Indian tribe arising from the failure of a State to enter into negotiations with the Indian tribe for the purpose of entering into a Tribal-State compact under paragraph (3) or to conduct such negotiations in good faith . . . .

25 U.S.C. § 2710(d)(7)(A)(i). A separate paragraph states:

> An Indian tribe may initiate a cause of action described in subparagraph (A)(i) only after the close of the 180-day period beginning on the date on which the Indian tribe requested the State to enter into negotiations under paragraph (3)(A).

25 U.S.C. § 2710(d)(7)(B)(i).

This Court has demanded the "simple but stringent test" of clarity as a means of balancing abrogation versus the Eleventh Amendment. *Dellmuth,* 491 U.S. at 227-28. In *Dellmuth,* abrogation was available because the Education of the Handicapped Act was "assumed" to have been enacted pursuant to Congress' authority under § 5 of the Fourteenth Amendment. *Id.* at 227 n.1. Here, if the abrogation power is encompassed by the Indian Commerce Clause or the *Pennsylvania v. Union Gas* analysis, Congress' clear statement carries the day. But if neither

abrogation nor *Ex parte Young* suffices, then that clear statement of congressional intent demonstrates the importance of preventing *Hans* from infringing upon the fundamental goals of the Indian Commerce Clause.

In IGRA, Congress intended to abrogate state immunity. Article I, Section 8, Clause 3 expressly provides a grant of exclusive power to Congress to regulate Indian Commerce. Article III of the Constitution grants power to federal courts to hear cases arising under the laws and Constitution of the United States. The Eleventh Amendment's plain language *does not* preclude the Tribe's suit. *Hans v. Louisiana* has been candidly conceded to be unfaithful to the text of the Amendment. *Atascadero*, 473 U.S. at 238. Fidelity to federalism forms the foundation for *Hans*. But distinguishing *Hans* in this case is faithful to federalism, because of the history and plain language of the Indian Commerce Clause.

Hans v. Louisiana and *Ex parte Young* have forged powerful doctrines; the latter an acknowledged fiction, the former constructed on language which does not support its scope. Added now is another facet — the Indian Commerce Clause. "The relation of the Indian tribes living within the borders of the United States, both before and since the Revolution, to the people of the United States has always been an anomalous one and of a complex character." *Kagama*, 118 U.S. at 381. The relation of the Indian Commerce Clause and the Eleventh Amendment need not be anomalous or complex. The plain language of the Eleventh Amendment excludes tribes. The plain language and history of the Indian Commerce Clause supports a surrender of state sovereignty. *Hans v. Louisiana* need not, and does not, preclude the Seminole Tribe's federal court suit against the State of Florida.

CONCLUSION

For the foregoing reasons, the decision of the Eleventh Circuit Court of Appeals that the Eleventh Amendment confers immunity upon the State of Florida and its Governor should be reversed, and the case remanded for further proceedings to determine the merits of the Tribe's claims under the Indian Gaming Regulatory Act.

Respectfully submitted,

BRUCE S. ROGOW
Counsel of Record
BEVERLY A. POHL
BRUCE S. ROGOW, P.A.
Suite 200
350 Southeast Second Street
Fort Lauderdale, FL 33301
(305) 767-8909

JERRY C. STRAUS
MICHAEL L. ROY
JUDITH A. SHAPIRO
HOBBS, STRAUS, DEAN & WALKER
1819 H Street, N.W., Suite 800
Washington, D.C. 20006
(202) 783-5100

Attorneys for Petitioner

Of Counsel:

EUGENE GRESSMAN
JOHN J. GIBBONS

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